

Service Date: August 26, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF TAVERN	)	TRANSPORTATION DIVISION
EXPRESS, INC., Miles City, Montana,	)	
Application for a Montana Intrastate	)	DOCKET NO. T-97.11.PCN
Certificate of Public Convenience	)	
and Necessity.	)	ORDER NO. 6433

**PROPOSED ORDER**

APPEARANCES

FOR THE APPLICANT:

Gary Ryder, Attorney at Law, P.O. Box 72, Hysham, Montana 59038

FOR THE PROTESTANTS:

Marvin L. Howe, Simonton, Howe, and Schneider, P.C., Attorneys at Law, P.O. Box 1250, Glendive, Montana 59330, representing Miles City Cab

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

BEFORE:

NANCY MCCAFFREE, Vice Chair and Hearings Examiner

INTRODUCTION

1. On February 26, 1997, Tavern Express, Inc., Miles City, Montana, filed before the Public Service Commission (PSC) an Application for Intrastate Certificate of Public Convenience and Necessity, requesting Class B (regular rates, no fixed termini or regular route) motor carrier authority to transport passengers between all points in Custer County, Montana.

Protests to the application were filed by Frank and Emma Johnston, dba Miles City Cab, Miles City, Montana, and Just Limos, Inc., Poplar, Montana. The protestants each hold PSC-issued motor carrier authority conflicting, in whole or in part, with the authority applied for by Tavern Express.

2. A formal public hearing on the application was held on May 9, 1997, in Miles City. Testimony, exhibits, and public comment were there taken before the hearings examiner. Initial and response briefs have been submitted. Tavern Express and Just Limos reached a settlement during hearing, the terms of which include a withdrawal of Just Limos' protest and, if Tavern Express's application is granted, the authority issued shall limit transportation to eight passengers or less and prohibit operations in limousine service.

3. The hearings examiner has now fully considered the evidence and arguments submitted by Tavern Express and Miles City Cab. The hearings examiner determines that Tavern Express's requested authority should be granted, but limited in comparison to that requested, including the limitations stipulated to, for the reasons expressed in the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

4. All preliminary matters which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this order are incorporated herein as findings of fact.

5. Tavern Express is a corporation formed by several Miles City taverns or tavern owners in response to what they perceive to be a need, unmet by the existing carrier, Miles City Cab, to provide adequate transportation to local tavern patrons for movements between taverns and other taverns, residences, places of lodging, dining facilities, and other points in the Miles City area. Tavern Express indicates that the purpose of its proposed service includes increasing public safety and decreasing tavern patron offenses for driving under the influence.

6. Tavern Express intends to operate when there is sufficient demand, anticipated as being between 5:00 p.m. and 3:00 or 4:00 a.m., a period Tavern Express views as the most transportation intensive for tavern patrons. Tavern Express also intends to provide transportation

at other times to the extent required to meet the needs of tavern patrons. Tavern Express proposes a transportation fee of \$2.50 per rider and indicates that this fee may, or will, be paid by taverns contributing to the formation or maintenance of Tavern Express (member taverns) using the service. According to Tavern Express, its service would also be available to other riders (non-patrons) and other taverns (non-members) who purchase tickets for the service.

7. For a period prior to its application to the PSC, Tavern Express actually conducted a transportation service similar to that which it has applied for. The service was provided without having first obtained motor carrier authority. Tavern Express ceased operations at the request of the PSC and filed the present application for authority. Miles City Cab points out that it took several PSC communications before Tavern Express agreed to cease its unauthorized activities.

8. The testimony of all witnesses, whether on behalf of Tavern Express or Miles City Cab, directly or indirectly establishes a need for passenger transportation services in Miles City and the immediate vicinity. Even when confined to transportation of tavern patrons the evidence of record is such that the parties either do not, or cannot, dispute this. In general support of need Tavern Express witnesses provided information on Miles City's geographical layout, particularly noting Miles City's primary tavern area (downtown) is separated from Miles City's primary dining and lodging area by a distance reasonably requiring transportation. Tavern Express also noted some Miles City area taverns are located at points outside the city, also at distances reasonably requiring transportation. Tavern Express generally describes Miles City's tavern activities as being busy, particularly during several of Miles City's annual events (such as the Bucking Horse Sale). Miles City Cab does not disputed these things and its witnesses also testified directly or indirectly to the existence of a need for passenger services in Miles City. Miles City Cab's regular conduct of operations under its motor carrier authority also establishes that there is a need.

9. Predominantly, but not exclusively, Tavern Express takes the position that its proposed operations are based on a need for transportation of people who have been drinking and might choose not to drive or are not in a condition to drive safely or legally. Several of Tavern Express's witnesses testified to their opinion that Tavern Express's objective is sound given the

dangers inherent in drinking and driving. Along these same lines a number of references by Tavern Express and Miles City Cab witnesses were made to a Miles City "home free" program (taverns pay for drinking patrons' transportation "home" when requested or when believed necessary). The exact status of this "home free" program in Miles City remains unclear, but it appears to be an informal program that local taverns generally subscribe to when they see a need. No witness for Tavern Express or Miles City Cab expressed any opposition to the general need for safe transportation of tavern patrons in the Miles City area. Several Tavern Express witnesses, including the city's acting police chief, with supporting letters from the county's attorney and the city's mayor, local beverage distributors, and tavern owners or managers, support Tavern Express's proposed authority from a public safety standpoint. In relation to the "home free" program Miles City Cab takes the position that Tavern Express was organized by member taverns to replace the home free program's payments to Miles City Cab and reduce member expenses.

10. Miles City Cab witnesses testified that Miles City Cab is the area's existing carrier, and adequately provides the services it is obligated to provide regularly and in accordance with its PSC-issued authority. However, several Tavern Express witnesses testified (or at least implied through testimony) that the waiting time for Miles City Cab can be unreasonably long at times. More specifically, references were made to waiting times of fifteen to twenty minutes. Several Tavern Express witnesses also testified that Miles City Cab, for all practical purposes, is unavailable or does not operate after 2:00 p.m. Several Tavern Express witnesses testified that, at times, phone calls for Miles City Cab service have not been answered. Apparently these attempts to reach Miles City Cab were at or near 2:00 a.m. (and sometimes later), the scheduled closing time for taverns in Miles City. Some testimony and evidence submitted by Tavern Express was directed at an apparent poor condition of Miles City Cab's vehicles. At least one Tavern Express witness, a Miles City tavern employee, testified that she had met with Miles City Cab about tavern patron's complaints concerning Miles City Cab's service (wait time, no response, shoddy vehicles). In her opinion no action was ever taken by Miles City Cab to address or alleviate the stated concerns.

11. Miles City Cab, through testimony and exhibits, generally explained that the way in which it operates is necessary under the circumstances existing in its Miles City service area. Miles City Cab believes that it must operate the way it operates in order to survive. It is the opinion of Miles City Cab that it must increase ridership in order to improve its business. To Miles City Cab a grant of competing motor carrier authority will harm it.

12. Tavern Express presently owns one eight passenger van for intended use in its transportation services. Tavern Express witnesses have demonstrated that Tavern Express has a reasonable preliminary knowledge of motor carrier operations, including PSC requirements (such as insurance) and good motor carrier practices (such as vehicle maintenance and training of drivers).

#### CONCLUSIONS OF LAW

13. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this order are incorporated herein as conclusions of law.

14. The PSC has jurisdiction over applications for motor carrier authority pursuant to Title 69, Chapter 12, MCA. The application of Tavern Express is proper in form and was properly noticed, protested, and heard in accordance with Title 69, Chapter 12, MCA, and Title 2, Chapter 4, MCA (Montana Administrative Procedures Act).

15. The merits of Tavern Express's case, as do the merits of all contested applications for motor carrier authority, turn on the factors or elements within public convenience and necessity. The PSC will generally grant motor carrier authority when the public convenience and necessity requires authorization of the service proposed. In this regard, Section 69-12-323(2), MCA, provides:

(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give

due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

16. Additionally, Section 69-12-415, MCA (Ch. 156, L. 1993), provides that an authority may not be issued (or remain in force) unless the holder is fit, willing, and able to perform the service authorized and conforms to applicable legal requirements.

17. The analysis applied to reach a correct determination on whether the public convenience and necessity requires additional motor carrier authority has been set forth in numerous PSC motor carrier opinions. A representative example is Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987a, p. 8 (July 17, 1990), which describes the factors and process as follows:

Applying this language [sec. 69-12-323(2), MCA] to the facts presented by any application for authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the Applicant has demonstrated that there is a public need for the proposed services. If the Applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the Applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an Applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the Applicant fit to provide the proposed service.

18. The "fit, willing, and able" language of Section 69-12-415, MCA, was enacted subsequent to the opinion in Jones Brothers. However, as the quote from Jones Brothers

indicates, the PSC has historically treated fitness as an element in considering whether motor carrier authority should be granted.

19. The first element to consider in determining whether public convenience and necessity requires a grant is public need. The PSC concludes that there is no room for significant dispute on this point regarding the Miles City area. Both Tavern Express and Miles Cab have provided information clearly establishing a public need for passenger transportation in Miles City and its immediate vicinity. The PSC determines that there is a need for passenger transportation in Miles City. It should be noted that Tavern Express's applied-for service area is Custer County, but limited, if any, evidence was submitted pertaining to need or an absence of need in Custer County areas other than that immediate to Miles City. The record is not entirely clear on what Miles City's "immediate vicinity" should encompass, but Miles City and a radius of 10 miles seems to be appropriate under the circumstances.

20. The second element in public convenience and necessity is the ability of existing carriers to meet the demonstrated public need. Within reason an existing carrier must meet the public need for transportation within the carrier's service area and, as the public need changes (e.g., expands), the existing carrier's service must change. If the existing carrier does not meet the public need for transportation in its service area the carrier not only might not be fulfilling its obligation but is creating a service area ripe for further authority. However, the qualification "within reason" is important. There are reasonable limitations on the extent to which an existing carrier must stand ready, willing, and able to meet all needs.

21. Tavern Express established, and Miles City Cab did not clearly contradict, that there can be a waiting time for Miles City Cab services. Specifically the references of record are to instances where the waiting time has been fifteen to twenty minutes. Considering all circumstances present in the Miles City transportation environment, particularly at the time that Miles City's tavern patron's transportation needs are the most intensive, this does not seem to be an unreasonable time to wait. The facts, and also what is self-evident about the Miles City area and most other cities and areas in Montana, are such that it cannot reasonable be expected that a carrier be required to provide a fleet of vehicles standing ready at the curbside of local taverns for immediate response to tavern patrons.

22. However, Tavern Express witnesses testified that at times Miles City Cab does not answer its phone and does not seem to operate after 2:00 a.m. Although Miles City Cab witnesses testified that this is not the case, the PSC is convinced that, for all practical purposes, it is the case. Although Miles City Cab explained that it operates when there is an apparent need at all times, it admitted that it is a small operation and, at times (e.g., when its dispatcher must also drive to meet the need), it might not be available to answer phones. Miles City Cab also expressed an opinion that both it and Tavern Express, if granted authority, would not be able to meet the specific need which might develop on certain occasions. Although an existing carrier might not be viewed as failing in its service obligation under these circumstances, simply relieving the carrier of such obligation does not cause the unmet need to disappear.

23. The record demonstrates that there is an unmet need at certain times of day in Miles City and its immediate vicinity. Miles City Cab has not provided any clear indication that it intends to do anything to change its operations to meet this unmet need. The PSC concludes that Miles City Cab, as the existing carrier, is not able to meet a part of the public need established in this proceeding.

24. The third element considered in public convenience and necessity is harm to existing carriers. The PSC concludes that this element needs little discussion for at least two reasons. One, the existing carrier is not able to meet a part of the need. For that part no analysis of harm is necessary. Two, harm can exist so long as it is not contrary to the public interest. It is in the public interest that transportation be provided as an alternative to tavern patrons, many of whom might have been drinking, driving themselves. This is important and any harm it may cause the existing carrier is not contrary to the public interest.

25. The fourth element is fitness. An applicant for motor carrier authority must establish that it is fit, willing, and able to provide the services proposed. Section 69-12-415, MCA. Tavern Express has established this. There is no substantial evidence to the contrary. Given the limited scope of the authority applied for, and granted herein, Tavern Express's understanding and intentions regarding its proposed operations are sufficient for all purposes, including as these elements might apply in regard to motor carrier fitness.



26. Miles City Cab argues that Tavern Express's illegal operations prior to applying for authority demonstrates a lack of fitness. The PSC disagrees. Tavern Express ceased operations at the time the PSC advised it with certainty that its operations required motor carrier authority.

### ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this order are incorporated herein as an order.

2. All pending objections, motions, and arguments not specifically having been ruled on in this Order shall be deemed denied, to the extent that such denial is consistent with this Order.

3. The PSC, being fully apprised of all premises, HEREBY ORDERS that the Application for Intrastate Certificate of Public Convenience and Necessity filed by Tavern Express, Inc., Miles City, Montana, be granted with limitations as follows:

Class B -- passengers between all points and places in Miles City, Montana, and a ten mile radius thereof, limited to the hours of 12:00 midnight and 4:00 a.m. daily, vehicle capacity of eight passengers or less, operations in limousine service prohibited, member taverns (taverns contributing to the formation or continued maintenance of Tavern Express, Inc.) if implementing a practice of paying the fee for ridership of tavern patrons shall make every reasonable effort to use and pay the fee for ridership of tavern patrons on other common carriers authorized to transport passengers in the service area, on similar terms, when vehicles of Tavern Express, Inc., are not available to meet the convenience of patrons.

The certificate shall issue upon Tavern Express's compliance with pre-certificate requirements of the PSC. The certificate may be reworded by PSC compliance staff for purposes of maintaining consistency in wording of motor carrier authorities in general, the substance not to be changed.

Done and dated this 26th day of August, 1997.

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NANCY MCCAFFREE  
Vice Chair and Hearings Examiner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the PSC prior to Final Order. See, Section 2-4-621, MCA. Exceptions and briefs must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See, ARM 38.2.4803 and 38.2.4804.

No transcript of hearing on this matter has been ordered by any party or the PSC. If exceptions are filed as to any finding of fact, the party making the exception shall provide a complete transcript and reference the portions of the transcript which pertain to the exception. Stipulations to facts between the parties may, upon PSC approval, substitute for this transcript requirement.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order issued in Docket T-97.11.PCN in the matter of Tavern Express, Inc. (Miles City, Montana) has today been sent to all parties listed.

MAILING DATE: August 26, 1997

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FOR THE COMMISSION

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